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Deputy Clerk

DURIE TANGRI LLP
SONAL N. MEHTA (SBN 222086)
smehta@durietangri.com
JOSHUA H. LERNER (SBN 220755)
jlerner@durietangri.com
LAURA E. MILLER (SBN 271713)
lmiller@durietangri.com
CATHERINE Y. KIM (SBN 308442)
ckim@durietangri.com
ZACHARY G. F. ABRAHAMSON (SBN 310951)
zabrahamson@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendants
Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier
Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar

CIV533328
MPAR
Memorandum of Points and Authorities in Repl
1690169



SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23

**REPLY IN SUPPORT OF DEFENDANT
FACEBOOK, INC.'S MOTION TO OPEN
DISCOVERY AND TO COMPEL**

Date: March 15, 2019
Time: 10:00 a.m.
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

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1 **I. INTRODUCTION**

2 It has been nearly four months since Six4Three’s principal and legal team admitted under oath to
3 multiple violations of this Court’s orders—violations that fundamentally undermine the discovery
4 process that this Court is tasked with safeguarding. In those four months, despite extraordinary effort
5 and expense by Facebook to seek relief and admittedly extraordinary requests for the Court’s time and
6 attention, those violations have gone largely uninvestigated and entirely unpunished.

7 Although they initially pledged to cooperate with the investigation into their wrongdoing to gain
8 this Court’s sympathy and leniency, their every action since has been to derail or delay any effort to
9 determine the scope of their breaches. It is thus no surprise that even now—when Facebook seeks basic
10 discovery into how dozens (and potentially hundreds) of protected and sealed documents have made their
11 way into the hands of the UK Parliament, the international press, and the public at large¹—the
12 oppositions filed by Six4Three and Messrs. Kramer and Scaramellino seek to block Facebook, and
13 importantly the Court, from uncovering how this all happened, apart from the untested, self-serving
14 statements of those whose misconduct is directly at issue. As the Court has recognized, the sanctity and
15 enforceability of its orders is directly at issue here, and it is time to act to protect both.

16 At the outset, Six4Three tries to block Facebook’s motion altogether by arguing that it is an
17 improper motion for reconsideration. It is not. Even if it were, it would be granted because
18 circumstances have changed: Facebook moved *only* after Six4Three’s lawyers produced *9,000 pages* of
19 communications that Six4Three’s counsel previously represented *did not exist*. Hr’g Tr. at 36:8–10
20 (Nov. 30, 2018) (Mr. Godkin representing to the Court “[t]here have been no communications with third
21 parties regarding Facebook’s confidential information.”). Plus, the continuing, self-serving statements
22 from Messrs. Godkin, Gross, Scaramellino, Kramer, and Russo heighten the need for discovery that
23 would allow Facebook to test and the Court to assess the veracity of Six4Three’s story.

24 For the same reasons, once discovery is open, Six4Three’s privilege claims must be overruled.
25 The crime-fraud exception applies. And Six4Three and its legal team waived privilege in an effort to
26

27 ¹ Just last Saturday—less than 24 hours after the Court granted Facebook’s *ex parte* application—
28 *another* leak sent more Facebook confidential information into the public domain. Like the documents
previously leaked on Github, this fresh disclosure has no apparent connection to the DCMS Committee.

1 excuse their misconduct. Six4Three hasn't rebutted Facebook's showing that Six4Three's legal team
2 planned a fraud on the Court by disseminating protected material to unauthorized third parties. Nor has
3 Six4Three said anything about its abuse of the protective order's expert designation protocols. To the
4 contrary, the new evidence uncovered yesterday (after the Court's Amended Case Management Order
5 No. 19), shows that Six4Three's legal team provided Facebook's confidential and highly confidential
6 information not only to a purported expert with ties to the reporters with whom Six4Three was working,
7 but also to a freelance researcher and a hedge fund manager—who also happened to be an undergraduate
8 classmate of Mr. Scaramellino—with no ostensible expertise or connection to the case whatsoever.

9 Six4Three's arguments should be rejected for what they are: an illogical and unsupported attempt
10 to preclude the Court from exercising its authority to safeguard the discovery process. Any other outcome
11 would permit a party to run rough-shod over this Court's orders—and abuse the protections upon which
12 good-faith participants in the litigation process rely every day.

13 **II. ARGUMENT**

14 **A. Facebook's Motion Is Not a Motion for Reconsideration, and Even If It Were, It** 15 **Should Be Granted.**

16 Let's set the record straight: Facebook's discovery motion isn't a motion for reconsideration.
17 Facebook was never given a chance to oppose the closing of discovery into Six4Three's violations of this
18 Court's orders. *See* Hr'g Tr. at 4:21–8:1 (Dec. 17, 2018). Indeed, Facebook clarified on the record that
19 the Court's orders were *not* intended to stop Facebook from challenging Six4Three's privilege
20 objections. *See id.* at 51:12–23 (“[Mr. Lerner:] [I]t wasn't clear to me if what you meant is there will
21 never be any discovery on this, in which case, I would definitely like to be heard or it was, no, file the
22 motions as I told you[.] . . . [The Court:] It's the latter.”). And the instant motion is the first time this
23 Court has even considered the waiver and crime/fraud questions presented. *See id.* at 31:18–32:2.

24 Moreover, even *if* this were a motion for reconsideration, the motion should be granted.
25 Six4Three focuses its argument on subpart (a) of section 1008, *see* Opp'n at 3, Third Parties' Opp'n at
26 3², but if it were a request for reconsideration, Facebook's motion would more properly be considered
27

28 ² Facebook objects to Messrs. Kramer and Scaramellino's improper “Opposition to Defendant Facebook,

1 under subpart (b), which provides that, “[a] party who originally made an application for an order which
2 was refused in whole or part, . . . *may make a subsequent application for the same order upon new or*
3 *different facts, circumstances, or law[.]*” Civ. Proc. Code § 1008(b).³ Unlike section 1008(a), there is
4 no deadline to move under section 1008(b). A motion under this subpart (b) “does not seek
5 reconsideration of the earlier motion but, instead, *is simply a new motion that is permitted by the*
6 *existence of new law or facts[.]*” *UAS Mgmt., Inc. v. Mater Misericordiae Hosp.*, 169 Cal. App. 4th 357,
7 367 (2008), *as modified on denial of reh’g* (Jan. 13, 2009).

8 Here, Facebook has presented a mountain of “new or different facts” gleaned from the **9,000-**
9 **page** production by Birnbaum & Godkin on January 7, 2019. *See generally* Def.’s Mem. P. & A. in
10 Supp. of Mot. to Open Disc. & Compel (“Mot.”) at 4:5–8:9. For example, neither Facebook nor the
11 Court had *any idea* that Six4Three had disclosed confidential information to a purported “expert” while
12 discussing with journalists from *The Guardian* his role as an anonymous source to confirm Six4Three’s
13 claims about the contents of Facebook’s confidential and highly confidential documents. *See* Mot. at
14 6:8–7:3. That fact alone upends the picture painted for the Court by Six4Three and its legal team.

15 Six4Three tries to minimize this blockbuster revelation by arguing that “the protective order
16 expressly permitted the parties to retain consultants and experts[.]” Opp’n at 6:1–9. Fair enough. But
17 the issue here is that Six4Three’s legal team appears to have hired experts to satisfy their extra-legal
18 interests in publicizing Facebook’s confidential information to the press. Indeed, just the subset of
19 emails produced so far shows Six4Three’s legal team discussing with reporters whether “[the expert]
20 could be an anonymous source verifying our allegations without disclosing him as an expert witness[.]”
21 *See* Miller Decl. Supp. Def.’s Mot. to Open Disc. & Compel (Jan. 8, 2019) (“Miller Decl.”) Ex. 18.
22 While Six4Three, its counsel, and Messrs. Kramer and Scaramellino gave sworn statement after sworn
23 statement (often unauthorized) to try to explain away their actions, Six4Three’s Opposition is stunningly

24 _____
25 Inc.’s Improper Motion for Reconsideration to Open Discovery and to Compel” (Jan. 16, 2019)
26 (hereinafter “Third Parties’ Opp’n”). Messrs. Kramer and Scaramellino are not parties to this case, have
27 not sought leave to intervene, *see* Civ. Proc. Code § 387, and have not moved for a protective order as
28 “affected natural person[s]” under Civil Procedure Code § 2025.420. Nevertheless, Facebook’s Reply
will address that Opposition where relevant. Facebook also notes that it answered in November 2018 the
questions raised on page three of the Third Parties’ Opposition. *Compare* Third Parties’ Opp’n at 3:4–20
with Miller Decl. in Supp. Def.’s Br. Re: Court’s Order Dated Nov. 20, 2018 (Nov. 28, 2018), Ex. 1.

³ Emphasis added and internal citations omitted throughout, unless otherwise noted.

1 silent on this scheme to pass confidential information to reporters via these experts-cum-anonymous
2 sources.

3 And just yesterday, as a result of the Court's Amended Case Management Order No. 19,
4 Six4Three and its legal team revealed even more evidence supporting a conclusion of widespread
5 disclosure of confidential information for improper purposes. For example, Facebook learned for the
6 first time that Birnbaum & Godkin "engaged" a hedge fund manager and former classmate of Mr.
7 Scaramellino, Brent Frissora, "to assist the legal team with analysis of Facebook's privilege logs." *See*
8 Decl. of Zachary G. F. Abrahamson in Supp. of Reply to Def.'s Mot. to Open Disc. & to Compel
9 submitted herewith ("Abrahamson Decl."), Ex. 1 (Decl. David S. Godkin in Resp. to CMO No. 19 ¶ 8
10 (Mar. 5, 2019) ("Godkin Decl.")⁴ Mr. Frissora appears to lack any legal education, expertise, or
11 experience, and has no known connection to this litigation. According to Mr. Godkin, his firm
12 "engaged" Mr. Frissora and had him sign onto the protective order, but Mr. Scaramellino was the only
13 member of Six4Three's legal team to communicate with Mr. Frissora; Mr. Godkin (who swore to the
14 Court he would supervise Mr. Scaramellino) can offer no answers on whether and when Mr. Frissora
15 received confidential information, let alone what he has done with it. Abrahamson Decl. Ex. 1, Godkin
16 Decl. ¶ 8. Indeed, despite Amended Case Management Order No. 19, Mr. Godkin failed to provide a
17 declaration from Mr. Frissora, and his own declaration is silent on efforts to secure such a declaration.

18 Six4Three's remaining arguments on the "new facts" prong lack merit. **First**, there is simply *no*
19 requirement that Facebook identify an "unauthorized disclosure of its confidential or highly confidential
20 documents *other than the disclosure to MP Damien Collins*" in order to investigate *that* first disclosure.
21 Opp'n at 4:6–8. **Second**, Mr. Godkin's claim—that he only summarized "the publicly-filed Fifth
22 Amended Complaint, not Facebook's confidential documents," *see* Opp'n at 5:9–12⁵—misstates the
23 record. We have emails that show Mr. Godkin writing to a legislator and stating that "[his] firm has

24 _____
25 ⁴ Mr. Frissora appears not to be the "unidentified retained consultant" referenced in Paragraph 4 of the
26 Declaration of David S. Godkin in Support of Response of David S. Godkin, James E. Kruzer and
27 Birnbaum & Godkin, LLP to Defendant's *Ex Parte* Application for an Order Enforcing the Stipulated
28 Protective Order (Feb. 28, 2019) ("Godkin Decl. Opp'n Def.'s Appl. to Enforce PO")—that was Ms.
Kapp, a "freelance researcher" with no apparent legal training, education, or experience that was
nevertheless retained to help identify potential witnesses. Instead, it appears that Mr. Godkin's February
28, 2019 declaration *failed to disclose the existence of this fourth individual at all*.

⁵ *See also* Third Parties' Opp'n at 2 n.1.

1 obtained *extensive discovery of [Facebook] communications*” and that Mr. Godkin has “attempted to
2 summarize *the evidence* below.” See Miller Decl. Ex. 12. On this point, Mr. Godkin’s declaration is no
3 answer. Compare with Opp’n at 5:9–12 (citing ¶ 8 of Mr. Godkin’s declaration in support of
4 Six4Three’s Opposition). *Third*, the rules of professional conduct on which Six4Three relies do not
5 authorize Six4Three to subvert this Court’s processes and orders. See Opp’n at 5:17–22 (citing
6 California Rule of Professional Conduct, rule 3.6). The comments to the rule expressly preclude
7 communications that violate protective orders. See Cal. R. Prof’l Conduct, rule 3.6 cmt [1].

8
9 **B. Facebook Is Not Required to Seek Sanctions or Contempt As a Prerequisite to
Receiving Discovery Into Six4Three and Its Legal Team’s Misconduct.**

10 Six4Three and the Third Parties have cited no authority to support their demand that Facebook
11 seek sanctions or contempt *before* taking discovery. See, e.g., Opp’n at 6:27–7:9; Third Parties’ Opp’n at
12 3. Nor would such a requirement make sense. Msrs. Kramer and Scaramellino demanded in December
13 that Facebook seek a contempt order before any discovery proceed. See Hr’g Tr. at 16:20–25 (Dec. 17,
14 2018). Weeks later, Facebook received *10,000 pages* of evidence that the Court and Facebook would
15 never have seen had the Court proceeded as Six4Three and the Third Parties urged. See *supra* p. 3 &
16 Def.’s *Ex Parte* Appl. for Order Enforcing Stip. Protective Order at 7:5–7 (Feb. 25, 2019) (“Def.’s Appl.
17 to Enforce PO”). Likewise, a request for sanctions or contempt motion *now* would force Facebook to
18 proceed—and the Court to decide—on the self-serving record assembled by Six4Three and its legal team
19 in untested statements to the Court. See, e.g., Decl. of Thomas Scaramellino ¶¶ 9–15 (Feb. 6, 2019).
20 This Court—and Facebook’s due process rights—require more.

21 **C. The Crime/Fraud Exception Applies to All Communications Between Six4Three and
22 The Legal Team Regarding Facebook’s Confidential and Highly Confidential
Information.**

23 Facebook’s motion explained at length why Six4Three’s privilege objections to Facebook’s
24 discovery requests were meritless in view of the crime/fraud exception. See *generally* Mot. at 11:10–
25 12:13. Six4Three’s response asks that Facebook produce “evidence of publication of Facebook’s
26 confidential information other than the information disclosed by Mr. Kramer[.]” Opp’n at 7:16–17; see
27 *also* Third Parties’ Opp’n at 4 n.3. Of course, Facebook is under no obligation to show unauthorized
28 disclosures *in addition to those already admitted* by Messrs. Kramer and Scaramellino. And even

1 without the admitted violations, Facebook has met its burden. “Evidence Code section 956 *does not*
2 *require a completed crime or fraud.*” *BP Alaska Expl., Inc. v. Superior Court*, 199 Cal. App. 3d 1240,
3 1262 (1988). Instead, Facebook just needs a prima facie showing that Six4Three used its lawyers “to aid
4 anyone to commit or plan to commit a crime or fraud.” *State Farm Fire & Cas. Co. v. Superior Court*,
5 54 Cal. App. 4th 625, 643 (1997), *as modified* May 1, 1997).

6 Here, the evidence raises far more than a prima facie showing that Six4Three and its legal team
7 planned to abuse the expert designation process to leak information in violation of the protective order.
8 *See* Mot. at 6:8-7:3, 12:3-6. Emails from Six4Three’s legal team to journalists—on which multiple
9 lawyers from Birnbaum & Godkin were copied, *see* Miller Decl. Ex. 18—discuss whether Six4Three’s
10 expert, Paul-Olivier Dehaye, could anonymously verify Six4Three’s allegations for journalists. This was
11 just one week after Mr. Godkin engaged Mr. Dehaye as “an expert consultant” for the purported task of
12 assisting Six4Three’s legal team in reviewing Facebook’s arguments related to unspecified “digital
13 privacy issues.”⁶ *See* Abrahamson Decl. Ex. 2 at pdf pp. 8–9 (Naik Letter to Mehta (Mar. 5, 2019)). Just
14 yesterday, Facebook received a letter from Mr. Dehaye’s lawyer, identifying approximately forty
15 confidential and highly confidential documents provided to Mr. Dehaye. Abrahamson Decl. Ex. 2 at 5–
16 6. The letter is silent on whether Mr. Dehaye disclosed or discussed Facebook’s confidential information
17 with third parties, including the DCMS Committee⁷ and journalists. Six4Three’s Opposition never
18 explains why this evidence falls short of the prima facie showing required under Evidence Code
19 section 956.

20 **D. There Is No Credible Dispute That Six4Three Has Waived Privilege.**

21 Facebook’s motion showed that Six4Three’s privilege assertions were meritless for a second
22 reason: waiver. *See generally* Mot. at 12:14–14:1. Six4Three’s only response is that Facebook
23 purportedly “points to no examples of communication of privileged material to a third party.” Opp’n at

24 _____
25 ⁶ Further calling into doubt Six4Three and its legal team’s true intentions in engaging Mr. Dehaye, while
26 the engagement letter states Mr. Dehaye’s supposed expertise as in the field of “digital privacy issues,”
Mr. Dehaye’s attorney apparently understands his engagement more broadly to cover any “public interest
elements of the *Six4Three* litigation.” Abrahamson Decl. Ex. 2 at 2.

27 ⁷ Mr. Dehaye has been cooperating with the DCMS Committee and provided testimony adverse to
28 Facebook. *See, e.g.,*
[http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-
media-and-sport-committee/disinformation-and-fake-news/oral/81022.pdf](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/disinformation-and-fake-news/oral/81022.pdf).

1 8:9–10. Not so. Facebook’s motion pointed the Court and Six4Three to Mr. Kramer’s November 26,
2 2018 declaration. *See* Mot. at 13:8–15. There, Mr. Kramer describes “the explicit statements by [his]
3 counsel contained in the various communications referenced above.” Kramer Decl. Supp. Pl.’s Br. in
4 Resp. to Nov. 20, 2018 Order ¶ 19 (Nov. 26, 2018). He goes on to state that he sent counsel “all of the
5 relevant information and materials regarding the sequence of events pertaining to my trip[.]” *Id.* ¶ 23. In
6 Paragraph 24, Mr. Kramer states that, “counsel instructed me to delete from my computer and dropbox
7 account any documents that could contain information designated highly confidential[.]”

8 Facebook’s motion also identified statements by Six4Three’s legal team that can only mean that
9 Six4Three waived privilege. Facebook’s motion cited Mr. Godkin’s November 26, 2018 declaration,
10 which states that Mr. Godkin “confirmed that Mr. Kramer had never reviewed any [highly confidential]
11 documents[.]” *See* Godkin Decl. Supp. Pl.’s Br. in Resp. to Nov. 20, 2018 Order ¶ 8 (Nov. 26, 2018).
12 Mr. Godkin again put Six4Three’s communications in issue when he stated that, “Mr. Kramer did not
13 consult with me upon receiving DCMS Order #3 . . . on November 21, 2018.” *Id.* ¶ 15.

14 These self-serving disclosures have not stopped. Two weeks after Facebook moved to open
15 discovery, Mr. Kramer filed a declaration related to Six4Three’s lawyers’ motions to withdraw. *See*
16 *generally* Kramer Decl. Re: Pl.’s Conditional Acceptance of Mot. to Be Relieved as Counsel (Jan. 24,
17 2019). Mr. Kramer declared that, “[i]n coordination with counsel for 643, I took measures at the time
18 the Dropbox sub-folder in which Facebook’s highly confidential files were reviewed to prevent my
19 access to those files *and requested that counsel do the same*[.]” *Id.* ¶ 3. To take another example, just
20 days ago, Mr. Godkin declared that he told a retained expert to “return or destroy all Facebook
21 confidential information that he had . . . , including all documents referring to Facebook’s confidential
22 documents[.]” *See* Godkin Decl. Opp’n Def.’s Appl. To Enforce PO ¶ 3. Mr. Godkin went on to
23 disclose the contents of that expert’s response. *See id.* That same day, Messrs. Scaramellino and Kramer
24 filed statements that “[n]either [they], nor, to the best of [their] knowledge, anyone acting on behalf of
25 Six4Three . . . ever forwarded any information to” certain individuals involved in recent leaks of
26 Facebook’s confidential information. *See* Kramer Decl. in Supp. of Opp’n to Def.’s Second Improper
27 Mot. for Recon. ¶ 4 (Feb. 28, 2019); Scaramellino Decl. in Supp. of Opp’n to Def.’s Second Improper
28 Mot. for Recon. ¶ 3 (Feb. 28, 2019).

1 Through these declarations, Six4Three is disclosing the facts they like without allowing the Court
2 or Facebook to test them—a quintessential use of attorney-client communications as a sword, barring
3 reliance on privilege as a shield. *See, e.g., Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir.
4 1992) (“The privilege which protects attorney-client communications may not be used both as a sword and a
5 shield.”). Taken with the statement in Six4Three’s Opposition, that “Six4Three’s counsel of record is
6 ethically bound . . . to safeguard Six4Three’s privileged communications,” Opp’n at 8:10–12, the
7 disclosures can only be read to mean that Six4Three has selectively waived privilege.

8
9 **E. Depositions of Mr. Kramer and Six4Three’s Legal Team Are Essential to
Understanding the Scope of Six4Three’s Violations.**

10 Facebook’s motion sought depositions of Mr. Kramer and Six4Three’s legal team, *see* Mot. at
11 9:8–9, and explained how this situation justifies attorney depositions. *See* Mot. at 14:2–15:24 (quoting
12 *Spectra-Physics, Inc. v. Superior Court*, 198 Cal. App. 3d 1487, 1494-95 (1988)).⁸ Six4Three responds
13 with one-liners or non sequiturs that do not grapple with the evidence in Facebook’s motion.

14 First, Six4Three’s suggestion—that Facebook depose “the press and governmental
15 representatives,” Opp’n at 9:6–10—is laughable. At the outset, Six4Three has offered no authority that
16 Facebook even *could* depose the member of Parliament and staff to whom Mr. Kramer leaked
17 Facebook’s documents. *See* Miller Decl. in Supp. Def.’s Br. Re: Court’s Order Dated Nov. 20, 2018, Ex.
18 1 ¶ 6 (“The courts of the United Kingdom cannot inquire into what is said or done before, or by, a select
19 committee. *This follows from parliamentary privilege*[.]”). Similarly, a raft of protections shield
20 journalists from revealing information about sources. *See, e.g.,* Evid. Code § 1070 (California Shield
21 Law). Six4Three also has not explained how Facebook could depose foreign nationals that are not party
22 to this case or otherwise subject to this Court’s jurisdiction. Even assuming *those* obstacles away,
23 Facebook would not know *whom* to depose without Mr. Kramer’s testimony about who witnessed his
24 disclosure to the DCMS Committee and the legal team’s testimony about which journalists Six4Three
25 spoke to regarding Facebook’s information.

26
27 ⁸ Facebook also pointed out that Mr. Scaramellino has never invoked that standard—a fact that
28 Six4Three does not appear to dispute. *Compare* Mot. at 14:3–9 with Opp’n at 8:18–19 (“[T]he portion
requesting leave to depose *Messrs. Godkin and Gross* should further be denied[.]”).

1 Second, Six4Three's position on privilege fails entirely to address Facebook's authorities on the
2 crime/fraud exception and waiver. *See generally* Mot. at 11:11–14:1. The sum total of Six4Three's
3 reasoning on the privilege issue, as applied to attorney depositions, is as follows: "[T]he testimony that
4 would be sought from Messrs. Godkin and Gross would be privileged." *See* Opp'n at 9:11–12. That
5 one-liner hardly refutes the statutes, cases, and documented disclosures described *supra*. And if the
6 depositions of Messrs. Godkin and Gross stray into material privileged to some other client or on some
7 other basis, both Messrs. Godkin and Gross have retained counsel who can assert such privileges. *See*
8 *also* Mot. at 14 n.8 (quoting *Meritplan Ins. Co. v. Superior Court*, 124 Cal. App. 3d 237, 239 (1981)
9 ("We can conceive of many relevant questions which would not violate the privilege.")).

10 Finally, Six4Three's argument that attorney depositions would be irrelevant or cumulative
11 misstates the facts and the law. *See generally* Opp'n at 9:11–23. Six4Three's suggestion that the Court
12 has "recognized Facebook has what it needs" for a sanctions or contempt motion misunderstands the
13 record. *See id.* at 9:14. It is true that the Court has recognized that, "if it chooses to do so, Facebook
14 may file[] its noticed motion for terminating sanctions on a noticed motion[.]" Minute Order at 2 (Dec.
15 17, 2018). But the Court has not yet considered the issue of contempt or sanctions, let alone ruled on it.

16 More fundamentally, Six4Three's claim that Mssrs. Godkin and Gross have nothing relevant to
17 say is flat wrong. *See* Opp'n at 9:19–21. Facebook unquestionably has the right to seek discovery
18 regarding "any matter, not privileged, that is **relevant to the subject matter involved in the pending**
19 **action or to the determination of any motion made in that action[.]**" Civ. Proc. Code § 2017.010.
20 Those provisions encompass all information that might "reasonably assist a party in *evaluating* the
21 case, *preparing* for trial, or *facilitating* settlement[.]" *Gonzalez v. Superior Court*, 33 Cal. App. 4th
22 1539, 1546 (1995) (citation omitted). In view of these authorities, Six4Three cannot argue that Facebook
23 may not seek discovery about misconduct that could result in terminating and other sanctions.

24 Indeed, here, the percipient knowledge of Six4Three's legal team is **essential** to motions for
25 contempt and sanctions. For example, only Mr. Scaramellino's testimony can establish "why, when, and
26 how he put Facebook's confidential and highly confidential information in the Six4Three Dropbox, and
27 why, when, and how he communicated with third parties about Facebook's information." Mot. at 14:7–
28 9. As for Mssrs. Godkin and Gross, only their testimony can answer questions about the legal team's

1 role in Six4Three's scheme to disseminate Facebook's information, including to purported "experts" like
2 Mr. Dehay. *See* Mot. at 15:3–13. Indeed, both lawyers have put that role at issue by filing self-serving
3 statements about their involvement. *See* Gross Decl. in Supp. of Resp. to Def.'s *Ex Parte* Appl. for
4 Order Enforcing Stip. Protective Order ¶ 8 (Feb. 26, 2018) ("[Mr. Gross:] I did not pay much attention to
5 these emails with the press on which I was simply copied.") & Godkin Decl. Opp'n Def.'s Appl. to
6 Enforce PO ¶ 5 ("At no time did B&G . . . sanction the release . . . by experts . . . of any confidential or
7 highly confidential information . . . , nor is it aware of such activity."). Facebook is entitled to cross-
8 examine them on those statements. *See, e.g.*, 1 Witkin, Cal. Evid. 5th Hearsay § 11 (2018) ("An
9 allegation in a pleading or similar paper, though verified, is not evidence in favor of the pleader.").

10 **F. This Motion Should Not Be Delayed While Six4Three Hires Substitute Counsel.**

11 Six4Three's lawyers have said that this case must pause until Six4Three finds new lawyers
12 because, the lawyers say, they are conflicted. *See, e.g.*, Birnbaum & Godkin's Mem. Supp. Mot. to Be
13 Relieved as Counsel at 2 (Jan. 8, 2019); Pl.'s *Ex Parte* Appl. for Order Continuing Hr'g at 3:4–6 (Jan. 17,
14 2019). But Six4Three's Opposition proves what Facebook has argued for months: Six4Three's lawyers
15 can and must represent Six4Three until the Court lets them withdraw. *See, e.g.*, Def.'s *Ex Parte* Appl. to
16 Enforce PO at 13:17–14:27. Indeed, Six4Three's Opposition is only the latest example of Six4Three's
17 lawyers advocating when they have something to lose and kicking the can when they hope it will benefit
18 them or prevent the uncovering of more of their deceptive conduct. *See* Def.'s Opp'n to Pl.'s *Ex Parte*
19 Appl. to Continue Mot. to Open Disc. at 2:26–3:6 (Jan. 18, 2019). Whatever the outcome of their motion
20 to withdraw or the status of Six4Three's search for replacement counsel, Six4Three was represented by
21 the counsel who wrote this Opposition, and the Court should require them to argue it as scheduled.

22 **III. CONCLUSION**

23 The Court should grant Facebook's motion to open discovery and to compel.

24 Dated: March 6, 2019

DURIE TANGRI LLP

25
26 By: _____


ZACHARY G. F. ABRAHAMSON

27 Attorneys for Defendants
28 Facebook, Inc., Mark Zuckerberg, Christopher Cox,
Javier Olivan, Samuel Lessin, Michael Vernal, and
Ilva Sukhar

PROOF OF SERVICE

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On March 6, 2019, I served the following documents in the manner described below:

**REPLY IN SUPPORT OF DEFENDANT FACEBOOK, INC.'S MOTION TO OPEN
DISCOVERY AND TO COMPEL**

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from cortega@durietangri.com to the email addresses set forth below.

On the following part(ies) in this action:

Stuart G. Gross
GROSS & KLEIN LLP
The Embarcadero, Pier 9, Suite 100
San Francisco, CA 94111
sgross@grosskleinlaw.com

David S. Godkin
James Kruzer
BIRNBAUM & GODKIN, LLP
280 Summer Street
Boston, MA 02210
godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

*Attorneys for Plaintiff
Six4Three, LLC*

Donald P. Sullivan
Wilson Elser
525 Market Street, 17th Floor
San Francisco, CA 94105
donald.sullivan@wilsonelser.com
Joyce.Vialpando@wilsonelser.com
Dea.Palumbo@wilsonelser.com

Attorney for Gross & Klein LLP

Jack Russo
Christopher Sargent
ComputerLaw Group, LLP
401 Florence Street
Palo Alto, CA 94301
jrusso@computerlaw.com
csargent@computerlaw.com
ecf@computerlaw.com

*Attorney for Theodore Kramer and Thomas
Scaramellino (individual capacities)*

Steven J. Bolotin
Morrison Mahoney LLP
250 Summer Street
Boston, MA 02210
sbolotin@morrisonmahoney.com
Llombard@morrisonmahoney.com

James A. Murphy
James A. Lassart
Thomas P Mazzucco
Joseph Leveroni
Murphy Pearson Bradley & Feeney
88 Kearny St, 10th Floor
San Francisco, CA 94108
JMurphy@MPBF.com
jlassart@mpbf.com
TMazzucco@MPBF.com
JLeveroni@MPBF.com

Attorney for Birnbaum & Godkin, LLP

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct. Executed on March 6, 2019, at San Francisco, California.

3
4 
Christina Ortega